SUPREME COURT, U. S.

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No. 421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The orders entered by the District Court for the Northern District of Illinois, Eastern Division (Pet. p. 3a), and by the court below (Pet. pp. 1a-2a) were not accompanied by opinions.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on April 7, 1967. A petition for rehearing was denied on April 27, 1967. The petition for writ of certiorari was filed on July 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Did the Court below err in granting a writ of mandamus which vacated a denial of a motion for transfer of a personal injury case based on 28 U.S.C., Sec. 1404 (a), and ordered the district judge to transfer the case to the District Court in Tennessee, where the record indicates that the District Court, in denying the transfer, had relied upon unauthorized criteria, and where the residence of the plaintiff, the site of the accident, and the residence of all the witnesses, were in Tennessee?

STATEMENT

The petition in this case seeks review of the order of the court below granting a writ of mandamus which required petitioner to vacate and set aside his order denying respondent's motion to transfer the case entitled *Underwood* v. *Southern Railway Company* (No. 66-C-813, N. D. Ill., Eastern Division), and ordered petitioner to transfer that case to the United States District Court for the Eastern District of Tennessee, Northern Division. The various papers which formed the record before petitioner at the time he denied the Section 1404(a) motion made by respondent, disclose the following undisputed facts:

Ralph Underwood, a resident of Knoxville, Tennessee, suffered personal injuries in respondent's John Sevier Yards in that city in May 1963 while serving as a road conductor aboard one of respondent's trains. Immediately after the accident, Mr. Underwood was treated by Dr. V. H. Young of Knoxville, a private physician. Thereafter, he was cared for by Dr. Young on several occasions at Fort Sanders Presbyterian Hospital in Knoxville, where other physicians and staff members participated in his treatment.

Knoxville was and is the residence not only of Mr. Underwood and Dr. Young, but also of the engineer, fireman and brakeman on the train at the time of the accident, and of a signalman who was at the time in the caboose with Mr. Underwood. Nevertheless, Mr. Underwood first instituted suit against respondent in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, in July 1965. On motion of the respondent, the suit was dismissed on the basis of *forum non conveniens,* the state court noting that

> "the plaintiff is a resident of Tennessee and an employee of the defendant in Knoxville, Tennessee. The accident occurred in Knoxville, Tennessee. The witnesses made known to this Court are all in Knoxville, Tennessee.
>
> "The courts of Tennessee, both state and federal, are open to the plaintiff and the affidavits on file reflect that the plaintiff can obtain a fair and speedy trial in Knoxville, Tennessee." Pet. for Writ, Exh. "C".)

Following the dismissal of his Florida suit, Mr. Underwood instituted suit in April 1966 against respondent in the Circuit Court for the Twentieth Judi-

cial Circuit of Illinois, St. Clair County. That action was also dismissed on the ground of *forum non conveniens,* the court noting that the facts which had prompted the Florida court to dismiss were applicable to a suit brought in Illinois. (Pet. for Writ, Exh. "D").

Finally, in May 1966, Mr. Underwood made, as he put it, a "third attempt to find a fair and impartial tribunal" by instituting suit under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq., in the United States District Court in Chicago. (Pet. for Writ, Exh. 3, "Response of Plaintiff".) Respondent promptly filed a motion under Section 1404(a) of 28 U.S.C. to transfer the case to Knoxville. The supporting papers and affidavits, in addition to setting forth the facts stated above, averred that a jury trial could be had in six to eight months in the District Court in the Eastern District of Tennessee, Northern Division, and noted the expense and inconvenience that would flow from the necessity of transporting the five or more witnesses, including Dr. Young, from Knoxville to a Chicago trial, and the inadequacy of the alternative of being forced to rely before a jury on testimony taken by deposition.

In response, Mr. Underwood stated that a jury trial could be had in Illinois as quickly as in Tennessee, that one of the respondent's witnesses, the brakeman, had agreed to come to Chicago as a witness for the plaintiff, and that he intended to take the depositions of the others. In addition, Mr. Underwood disputed the probable amount of respondent's additional expenses for a Chicago trial, and offered to post a cash bond of $700 to cover the transportation and lodging expenses of respondent's witnesses. Affidavits attached

to Mr. Underwood's response showed that he had been examined, after institution of the suit, in Chicago, and that air travel time between Knoxville and Chicago is about two hours.

Finally, in a personal affidavit, Mr. Underwood stated that

> "It is my sincere belief that my right to a fair trial will be seriously infringed and prejudiced should my lawsuit be tried in the City of Knoxville, Tennessee."

Elaborating on this, the affidavit stated that Knoxville is a "railroad town", since respondent is one of the largest single industries in Knoxville, and that

> "in such an atmosphere as Knoxville, it is difficult, if not impossible, to find twelve jurors who can strike a balance between my rights as an injured railroad employee and the railroad which is so vital to the entire community." (Pet. for Writ, Exh. 3-a.)

In reply, respondent filed affidavits of the President and the former President of the Knoxville Bar Association, who vigorously denied that plaintiff could not receive a fair trial in the Knoxville courts.

On November 2, 1966, Judge Campbell, the petitioner, denied the motion to transfer, entering the following order (Pet. p. 3-a):

> "Upon consideration of the briefs and affidavits filed by the parties in light of the criteria tests set forth in § 1404(a) (Title 28 U.S.C.A.)—i.e. convenience of the parties and witnesses and most importantly the interest of justice—the court finds that there has not been a sufficient showing that '. . . the balance is strongly in favor of the

defendant . . .' so as to avoid plaintiff's choice of forum. *Gulf Oil Co.* v. *Gilbert,* 330 U.S. 501, 508."

The petition for writ of mandamus was filed in the court below on November 16, 1966. After memoranda and briefs had been filed, the court (one judge dissenting) vacated petitioner's order of November 2, 1966, and directed him to enter an order transferring the case to the United States District Court for the Eastern District of Tennessee (Pet. pp. 2a-2a).

REASONS FOR DENYING THE WRIT

The absence of opinions by the court below cannot obscure the one basic fact: that Mr. Underwood advanced no affirmative basis for denying the Section 1404(a) motion except his personal belief that respondent is such a "pervasive influence" in Knoxville, Tennessee, that justice in the Federal District Court is not available there. While his opposing papers attempt to show that the disadvantages, inconveniences and expenses of a trial in Chicago were somewhat less than as asserted by respondent, his own affidavit made clear the affirmative basis of his opposition.

Petitioner's order does not refer specifically to Mr. Underwood's claim that he cannot secure justice in the District Court in the Eastern District of Tennessee. Nonetheless, not only the nature of the record before him, as described above, but also the wording of his order, make it apparent that he considered this claim to be determinative. His order recites the consideration of the statutory grounds, but as to the first two—"the convenience of parties and witnesses"—there can be no dispute that trial in Chicago would cause substantial inconvenience. The order expressly empha-

sizes the third consideration: "most importantly, the interest of justice." On the record before petitioner this can only be interpreted as a reflection of Mr. Underwood's assertions.

The relative availability of justice in two Federal District Courts is an unauthorized and altogether improper standard for determining a Section 1404(a) motion. In *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, a finding by a district judge that "it would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois" was deemed improper by the court below, was repudiated by the Government in its appeal to this Court, and was implicitly rejected by this Court. As Mr. Justice Harlan, concurring, put it, such a consideration "was wholly out of bounds." 376 U.S. at p. 246.

Moreover, the express reliance by petitioner on the statement by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, that a plaintiff's choice of forum must prevail in the absence of a showing that "the balance is strongly in favor of defendant," indicates a further misunderstanding of the proper standards applicable to Section 1404(a) motions. The *Gulf Oil* decision was handed down in 1946, two years before Congress by the enactment of Section 1404(a) changed the prior rule. *Ex parte Collett*, 337 U.S. 55, 61. The change in standard is made explicit by the Court in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32:

> "As a consequence [of the revision of existing law by Section 1404(a)], we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser

> showing of inconvenience. This is not to say that . . . the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

In light of these considerations, particularly the obvious need to exclude consideration of the allegations in Mr. Underwood's personal affidavit, the order by the court below was entirely proper. Failure to transfer Mr. Underwood's case to Knoxville would have permitted exactly what Congress intended Section 1404(a) to prevent. As the Court stated in *Van Dusen* v. *Barrack*, 376 U.S. 612, 635:

> "In considering the Judicial Code, Congress was particularly aware of the need for provisions to mitigate abuses stemming from broad federal venue provisions. The venue provision of the Federal Employers' Liability Act was the subject of special concern."

In an accompanying footnote, the Court quoted the Revisor's Note to Section 1404(a) (Report of the House Committee on Revision of the Laws on H.R. 7124, 79th Cong., 2d Sess., p. A127), which states:

> "As an example of the need of such a provision [Section 1404(a)], see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S.Ct. 6, 314 U.S. 44, 86 L.Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio."

1. Section 1404(a) does not, as the petition asserts, preclude an appellate court from entering an obviously appropriate transfer order. See *Koehring Co.* v. *Hyde Construction Co.*, 382 U.S. 362, 364 (distinguishing the *Platt* case, upon which petitioner relies, presum-

ably on the ground that in the *Platt* case, which arose under Rule 21(b) of the Federal Rules of Criminal Procedure, the record disclosed facts which could have formed the basis for a proper denial of the motion); *Hoffman* v. *Blaski*, 363 U.S. 335 (affirming the Seventh Circuit order granting a writ of mandamus to compel transfer to another district).

2. Review of this case is not warranted by a conflict among the circuits as asserted in the petition. None of the Courts of Appeals takes the position that review of a Section 1404(a) order is never available prior to final judgment. On the contrary, the Courts of Appeals of all the circuits appear to agree that such review will be available where, as here, the action of the district court is based upon improper standards. See:

First Circuit: *In re Josephson*, 218 F.2d 174 (1954) (review by mandamus available in "really extraordinary situations").

Second Circuit: *A. Olinick & Sons* v. *Dempster Bros. Inc.*, 365 F.2d 439 (1966) (review by mandamus available to correct a "clear-cut abuse of discretion").

Third Circuit: *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (1951), *cert. denied*, 340 U.S. 953 (review by mandamus available where district court denied Section 1404(a) motion on ground that action could not be brought in the other district). *Cf. Rapp* v. *Van Dusen*, 350 F.2d 806 (1965, *en banc*) (mandamus available to review district court's denial of a claim of bias).

Fourth Circuit: *General Tire & Rubber Co.* v. *Watkins*, 373 F.2d 361 (1967, *en banc*) (writ issued where district court was shown to have abused discretion).

Fifth Circuit: *Humble Oil & Refining Co.* v. *Bell Marine Service, Inc.*, 321 F.2d 53 (1963); *Ex Parte Chas. Pfizer Co.*, 225 F.2d 720 (1955) (review available to correct a "clear abuse of discretion"); *Atlantic Coast Line R. Co.* v. *Davis*, 185 F.2d 766 (1950) (writ of mandamus granted where grounds upon which district court rested its decision were "wholly insufficient to support the order and to bring it within the terms of Section 1404(a)." *Id.* at 769). (The Fifth Circuit has declined to decide whether an interlocutory appeal or petition for writ of mandamus is the proper method of seeking review. See 321 F.2d at 55 n.5.)

Sixth Circuit: *Goranson* v. *Kloeb*, 308 F.2d 655 (1962) (mandamus available to correct "clear abuse of discretion").

Seventh Circuit: *Chicago, R.I. & P. R. Co.* v. *Igoe*, 220 F.2d 299 (1955, *en banc*), *cert. denied*, 350 U.S. 822 (mandamus granted to compel transfer where denial was "so clearly erroneous that it amounted to an abuse of discretion," 220 F.2d at 305).

Eighth Circuit: *McGraw-Edison Co.* v. *Van Pelt*, 350 F.2d 361 (1965, *en banc*) (overruling *Great Northern Ry.* v. *Hyde*, 238 F.2d 852 (1956), and holding that review available where district court's denial was "arbitrary").

Ninth Circuit: *Gulf Research & Development Co.* v. *Harrison*, 185 F.2d 457 (1950), *aff'd* by an equally divided Court, 344 U.S. 861 (review by mandamus available in "extraordinary" circumstances).

Tenth Circuit: *Houston Fearless Corp.* v. *Teter*, 318 F.2d 822 (1963) (review by interlocutory appeal available where "abuse of discretion" shown).

District of Columbia Circuit: *Wiren* v. *Laws,* 194 F.2d 873 (1951) (review by mandamus available where "the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute. [footnote omitted.]" *Id.* at 874).

See generally, 1 Moore, Federal Practice ¶ 0.147 at 1966-75 (1960, Supp. 1966); 7A Moore, *supra,* JC 613-14 (1966).

The reason is well stated by the Court of Appeals for the District of Columbia Circuit in *Wiren* v. *Laws, supra,* at p. 874: "If we were to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled."

3. Nor is review here warranted by the disagreement among the circuits on the more limited question as to the power to review a district court decision which is based upon proper standards but in which it is asserted that the district court has abused its discretion. In the first place, the present petition does not present that question; as already discussed above, improper standards formed the basis for his action. In the second place, the problem is being resolved by the Courts of Appeals themselves. As the Second Circuit Court of Appeals recently noted in *A. Olinick & Sons* v. *Dempster Bros., Inc.:*

> "The great majority of recent appellate decisions, including those of our court, indicate that the Courts of Appeals consider themselves possessed of the power to issue mandamus in extraordinary circumstances to correct the disposition of a transfer motion by the District Court, even where the District Court has purported to consider proper factors." 365 F.2d 439, 443 (1966).

This resolution of the initial doubts demonstrates the propriety of the Court's earlier reluctance to pass upon the issue,* and speaks for a continuation of that policy in the instant case.

CONCLUSION

Wherefore, the petition for certiorari should be denied.

Respectfully submitted,

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* See Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 244 (assuming, without deciding, that review by mandamus was appropriate); Van Dusen v. Barrack, 376 U.S. 612, 615 n. 3; Norwood v. Kirkpatrick, 349 U.S. 29, 33 (declining to pass upon propriety of issuance of mandamus and deciding on the merits); Hoffman v. Blaski, 363 U.S. 335 (affirming order which granted writ of mandamus to compel transfer): Chicago, R. I. & P. R. Co. v. Igoe, 220 F.2d 299 (7th Cir. 1955, *en banc*), *cert. denied*, 350 U.S. 822 (mandamus granted to compel transfer); Paramount Pictures v. Rodney, 186 F.2d 111 (3d Cir. 1951), *cert. denied*, 340 U.S. 953 (mandamus granted to vacate denial of transfer). Compare Koehring Co. v. Hyde Construction Co., 382 U.S. 362 (holding that appellate court's mandamus order is a permissible means to compel transfer).